accounting or the extent of the profits made.

FN28. Defendants point out that the trust made all of its Berkeley and OSI purchases, and most of its Hickory purchases, before Telco and Telvest made their larger purchases and before the contests for control began. They contend that these subsequent actions by other parties cannot transform the trust's earlier purchases into breaches of fiduciary duty. However, the argument misses the mark. First, before the trust made its purchases, other members of the Engle group had already begun to establish positions in the three companies, and Newbill was recommending the three companies to Engle and Libco as likely takeover candidates. Telco did not begin its larger purchases until April because it did not receive financing until shortly before the April 21st board meeting. Supplemental Appendix at 425. Most importantly, though, a fiduciary's duty is not limited merely to purchases. During the control contests the administrators also faced the continual choice of holding or selling their shares in the contested companies. Where the administrators faced the conflicting loyalties present in this case, their actions in *holding* the shares had the effect of putting them in breach of their fiduciary obligations under ERISA. *See Donovan v. Bierwirth,* 680 F.2d at 272-74 (applying fiduciary standards to decisions to hold stock).

***132**[7] We conclude, therefore, that Dardick and Zuckerman violated their fiduciary duties under section 404(a), section 406(a)(1)(D) and section 406(b)(1) of ERISA by investing the Reliable Trust's assets in Berkeley, OSI and Hickory. We reach that conclusion because the fiduciaries had divided loyalties with clear potential for conflicts of interests, because the fiduciaries with divided loyalties failed even to seek independent, disinterested advice regarding these investments and their duties to the plan beneficiaries and because, throughout prolonged contests for corporate control, the fiduciaries' use of the trust assets dovetailed at all times with the interests of the Engle group.[FN29] Were we to reach another result in this case, we do not see how the interests of ERISA plan beneficiaries could be protected from those who would use trust property in contests for corporate control. The fiduciary's duty of loyalty is exacting, and the Reliable Trust administrators' use of the assets entrusted to them falls substantially short of that exacting standard.

FN29. We emphasize here that it is not *per se* impermissible for employee benefit plans to invest in companies involved in control contests or to ally themselves with one side or another in a control contest. The central issue is the *independence* of the plan fiduciaries who must always be able to act solely for the benefit of those whose funds are entrusted to them. In the case before us, where potential conflicts of interest are present, where the plan administrators are anything but independent and where these administrators fail to undertake any independent investigation of the investments, the long term congruence is additional evidence of the fiduciaries' breach of ERISA's duty of loyalty. The congruence alone would not demonstrate a breach of that duty of loyalty.

Benefit plans subject to ERISA control an enormous pool of capital in today's economy. With their extensive investments in securities, they will frequently face difficult investment decisions in contests for corporate control. Therefore we emphasize that our finding of a breach of fiduciary duty in this case is predicated on the fiduciaries' intimate involvement with and interest in the other parties to the struggle for control. Where the plan fiduciary has interests outside the plan in a control struggle-interests which the benefit plan may be in a position to further or to impair-the risk is too great that the fiduciary will be unable to act as ERISA requires-solely in the interest of the plan beneficiaries.

As a practical matter, we view favorably the suggestion of the Secretary of Labor, as *amicus curiae,* that the preferred course of action for a fiduciary of a plan holding or acquiring stock of a target, who is also an officer, director or employee of a party-in-interest seeking to acquire or retain control, is to resign and clear the way for the appointment of a genuinely neutral trustee to manage the assets involved in the control contest.[FN30] Otherwise, the risk is too great that the trustee will come to a crossroads where the interests of the plan and the party-in-interest diverge. For example, while the party-in-interest may be seeking to accumulate as many shares as possible in order to maintain or acquire control, a plan's interest in maximizing its investment return may require it to tender its shares to a competing bidder for shares.[FN31]

FN30. It would not be necessary in all cases for

the interested fiduciary to withdraw completely from plan management. The critical step is to have independent persons manage the assets involved in the control contest.

FN31. Our holding in this case does not establish a *per se* rule based on potential conflicts of interest. We need not reach so far because here the fiduciaries with divided loyalties failed utterly to obtain independent advice from disinterested persons and because the trust's investment decisions were always congruent with the Engle group's interests. Nevertheless, we do not reject the *per se* standard here; should the proper case arise, we would need to decide the issue squarely.

The resignation of the interested fiduciary would also have the benefit of obviating in many cases the need for courts to sift through the complicated events surrounding a takeover in an attempt to gauge the prudence and motivations of trustees. Though neutral trustees will have the same fiduciary duties, we think it likely that the mantle of seeming objectivity worn by a ***133** neutral trustee will calm the fears of plan beneficiaries who might otherwise perceive the need to resort to the courts in order to ensure the safety of their entitlements.

IV.

[8] We must also consider whether Clyde Engle and Libco are fiduciaries with respect to the Reliable Trust's investments and, if so, whether they breached their fiduciary duties. ERISA provides that:

a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002(21)(A). The district court found that Engle did not have control or authority over the investment of plan assets except through his participation in the appointment of the plan administrators. Finding of Fact No. 21. The court concluded that Engle and Libco were not fiduciaries with respect to the plan's administration and investment. Conclusion of Law No. 7.

Plaintiffs argue that Engle and Libco come within the scope of section 1002(21)(A)(iii), which makes one a fiduciary to the extent a person "has any discretionary authority or discretionary responsibility in the administration of [a] plan." FN32 Plaintiffs contend that Engle and Libco had such discretionary authority over the plan by virtue of Engle's control of Libco and Libco's 100% ownership and control of Reliable Manufacturing: Libco had the power to appoint and remove the directors of Reliable (Engle, Zuckerman and Contarsy) who, in turn, had the power to appoint and remove the trust administrators (Dardick and Zuckerman). Therefore, plaintiffs argue, "By virtue of their ability to control appointments of Reliable Trust Administrators, Libco and Engle were fiduciaries." Brief of Appellants at 23.

FN32. Plaintiffs do not challenge on appeal the district court's conclusion that Telco and Telvest are not fiduciaries. *See* Brief for Appellants at 22-26.

It is clear that Engle and Libco are fiduciaries to the extent that they performed fiduciary functions in selecting and retaining plan administrators. ERISA recognizes that a person may be a fiduciary for some purposes and not others. The defendants contend that although Engle and Libco may be fiduciaries for the purpose of selecting and retaining plan administrators, that status does not make Engle and Libco fiduciaries with respect to the administrators' investment decisions.

Defendants' argument that ERISA ties fiduciary responsibilities to a person's actual authority is correct. The key language in the statutory definition is that a person is a fiduciary "to the extent" he or she exercises control or authority over the plan. The Secretary of Labor explained this language in a bulletin interpreting ERISA, which was published in the Code of Federal Regulations. In this bulletin, the Secretary was asked the following question and gave the following response:

D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility

for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect***134** to the plan. *However, their responsibility, and consequently, their liability, is limited to the selection and retention of fiduciaries* (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act). In addition, if the directors are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries to carry out fiduciary responsibilities, as provided in section 405(c)(2).

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

ERISA Interpretative Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1983) (emphasis supplied).

[9] This court has adopted a similar approach to analyzing fiduciary responsibilities under ERISA. *Brandt v. Grounds*, 687 F.2d 895, 897 (7th Cir.1982); *Chicago Bd. Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 259 (7th Cir.1983). In *Brandt,* we affirmed the dismissal of an action against a bank that had allowed a plan trustee to withdraw $175,000 from the plan's accounts. The trustee had obtained the money by forging, or by obtaining under false pretenses, the signature of another trustee. In addition to alleging a breach of the bank's duties as a depository for accepting the forged instruments, plaintiffs alleged that the bank had breached its fiduciary duties under ERISA by acting imprudently in violation of the prudent man standard of 29 U.S.C. § 1104(a)(1)(B). This court agreed that the bank may have been a fiduciary as a result of its providing investment advice for a fee, 29 U.S.C. § 1002(21)(A)(ii), but we held that "its fiduciary status existed only 'to the extent' that it provided that advice .... Thus, it appears that the personal liability of the Bank would be limited to its violations of 29 U.S.C. § 1104 in performing its investment advising functions." 687 F.2d at 897. The bank therefore was not a fiduciary with respect to its functions as a depository.

Similarly, in *Chicago Board,* we held that Connecticut General was a fiduciary because it had discretionary authority over management of plan assets by virtue of Connecticut General's power to amend its annuity contract with the Chicago Board Options Exchange. We noted, however, that Connecticut General's fiduciary status "only governs actions taken in regard to amending the contract and does not impose fiduciary obligations upon Connecticut General when taking other actions." 713 F.2d at 259.

Because Engle and Libco were fiduciaries with respect to the selection and retention of the plan administrators, the issue here is not whether they were fiduciaries but instead whether their fiduciary duties extended to the Reliable Trust investments in Berkeley, OSI and Hickory. The district court limited its analysis of this question to whether Engle and Libco directly exercised control over the Reliable Trust's investments. That analysis was too limited in scope.[FN33] The fact that Engle and Libco had ***135** only limited fiduciary responsibilities does not mean that they had no responsibilities whatever. As the fiduciaries responsible for selecting and retaining their close business associates as plan administrators, Engle and Libco had a duty to monitor appropriately the administrators' actions. 29 U.S.C. §§ 1104(a)(1), 1105(a) and 1105(c). *See*RESTATEMENT (SECOND) OF TRUSTS §§ 184, 224 (1959). Engle and Libco could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust. Engle and Libco were obliged to act with an appropriate prudence and reasonableness in overseeing Dardick's and Zuckerman's management of the Reliable Trust. *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 640 (W.D.Wis.1979). *See also Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 563 F.Supp. 653, 657 (C.D.Cal.1983).

FN33. Under the district court's analysis, Engle and Libco were not fiduciaries with respect to the investments because plaintiffs did not show that Engle and Libco exercised direct control over the investments. On paper, it is true, Engle's authority over the Reliable Trust could be exercised only indirectly through his membership on the Reliable Manufacturing board which appointed the plan administrators. On paper, Libco could control the trust only through its power to appoint the Reliable Manufacturing board which in turn appointed the Reliable Trust administrators. However, we

> think ERISA directs courts to look beyond Engle and Libco's formal authority with respect to the plan, limited to selection and retention of administrators, and to consider what real authority they had over plan investments by virtue of their having appointed Dardick and Zuckerman to be administrators. *See Fulk v. Bagley*, 88 F.R.D. 153, 162 (M.D.N.C.1980) ("in defining 'fiduciary' Congress was peculiarly concerned with realities, as distinguished from mere formalities."); *Eaves v. Penn*, 587 F.2d 453, 458 (10th Cir.1978).

By selecting Dardick and Zuckerman to administer the plan, Engle and Libco presumably obtained substantial *de facto* control over plan investment decisions. Dardick was Engle's personal attorney and general counsel to the business enterprises controlled by Engle-Libco, Telco, Telvest, GSC, the Bank of Lincolnwood and Sierra. Most, if not all, of his income was under Engle's direct control. Further, while the Reliable Trust was investing in Berkeley, OSI and Hickory, Dardick was at the same time assisting Engle, Libco, Telco and Telvest in their acquisition programs and litigation against the same three companies. Dardick was thoroughly aware of how the Trust's investments would affect those acquisition programs. There would have been no need for Engle to instruct Dardick about how to use the trust assets. However, plaintiffs have not shown that the district court clearly erred in finding that Engle and Libco did not exercise authority over the trust's investments in Berkeley, OSI and Hickory. But the analysis here is more properly focused on whether Engle and Libco fulfilled the duties of surveillance and oversight which stemmed from their power to select and retain the plan administrators.

The record shows that Engle was aware of the Reliable Trust's investments in Berkeley, OSI and Hickory, and that he also knew of Dardick's role and interest in the Engle group's acquisition efforts. He presumably should have been aware that Dardick-for whose appointment he was directly responsible-faced conflicting loyalties with respect to those investments. Engle also knew of Zuckerman's ties to the Engle group. Zuckerman was president of Reliable Manufacturing, a member of its board and administrator of the Reliable Trust, but he received no compensation for any of these positions. He was paid by Engle only as a consultant to Libco and as a member of the Libco board. Zuckerman thus had substantial interests of his own in the outcome of the Engle group's acquisition efforts, and Engle knew of those interests which created conflicting loyalties for Zuckerman as administrator of the Reliable Trust.

Libco was also aware of the Reliable Trust's investments and Dardick's and Zuckerman's conflicting interests. All three members of the Reliable Manufacturing board of directors-Engle, Zuckerman and George Contarsy-were also members of Libco's board of directors. Engle was chairman of the Libco board and held a controlling interest in Libco. Libco, of course, controlled the Reliable Manufacturing board which appointed and oversaw the Reliable Trust administrators, who faced such markedly conflicting interests in managing the trust's investments. Documents filed by Libco with the Securities and Exchange Commission show that Libco knew of the Reliable Trust's investments in Berkeley, OSI and Hickory.[FN34]

FN34. *See supra* notes 11, 13 and 14.

The question thus becomes whether Engle and Libco fulfilled their duties under section 404 and section 405 in light of their knowledge that the Reliable Trust administrators who managed the trust assets faced conflicting loyalties with respect to those investments. Engle and Libco were not obliged to examine every action taken by Dardick and Zuckerman, but under these circumstances, we think that Engle and Libco were obliged to take prudent and reasonable action to determine whether the administrators were fulfilling their fiduciary obligations. Engle and Libco could not abdicate all of their responsibilities by appointing Dardick and Zuckerman, nor could they insulate themselves from all fiduciary ***136** liability by limiting their roles in the administration of the trust.

Nothing in the record now before us shows that Engle or Libco took steps either to insure that Dardick and Zuckerman were fulfilling their fiduciary obligations or to remedy any violations which might have already occurred. However, because the district court's analysis of this issue was so limited, the district court should consider this issue on remand so that the parties may address themselves directly to whether Engle and Libco acted reasonably and prudently in light of their knowledge of the administrators' conflicting interests and the trust's investments. Therefore, we vacate the district court's conclusion that Engle and Libco were not fiduciaries with respect to the trust's Berkeley, Hickory and OSI investments, and we remand for further proceedings on the question of their liability as fiduciaries.

V.

[10] Plaintiffs also allege that the Reliable Trust terminated as a matter of law, either wholly or partially, in March 1979 when Reliable Manufacturing discharged seventy-five of its eighty-one employees and went into involuntary and then voluntary bankruptcy proceedings. They claim that Dardick and Zuckerman as administrators and the National Boulevard Bank as trustee breached their fiduciary duties by delaying distribution of the trust after its legal termination.

The dispute over the termination of the plan and distribution of plan assets arose only after this litigation was initiated. On February 8, 1979, plaintiffs moved in the district court for appointment of a receiver to distribute vested funds in the Reliable Trust. In early March 1979, as noted, Reliable Manufacturing went into involuntary bankruptcy proceedings, and seventy-five of its eighty-one employees were laid off. Later in March, the bankruptcy proceedings were converted to voluntary proceedings under Chapter 11. Under applicable Internal Revenue Service regulations and the terms of the Reliable Trust instruments, the plan may have terminated when Reliable Manufacturing began to discharge its employees and went into bankruptcy, and the plan beneficiaries may have been entitled to an immediate distribution of their shares in the trust. *See* Plaintiffs' Exhibits 7 and 8; 26 C.F.R. § 1.401-6 (1983). Beginning on March 1, 1979, attorneys for the Reliable Trust engaged in extended correspondence with the Internal Revenue Service seeking a determination of whether the trust had partially terminated. They described the lay-off of the seventy-five employees as "temporary" and "seasonal" in their letter to the IRS.

The district court denied the motion to appoint a receiver on May 30, 1979. Dardick and Zuckerman delayed distribution of the vested funds through the summer, saying they were waiting for the IRS to advise them. Then, on September 14, 1979, Dardick and Zuckerman asked the district court to approve a notice to be sent to plaintiff beneficiaries. The proposed notice offered the plaintiffs the following choice. First, they could receive immediate payment of all vested funds, but only if they released the defendants from all liability, including liability in this case. Second, if they did *not* release the defendants from liability, the plaintiffs would receive their vested funds only over a ten-year period, subject to an unspecified reserve. The district court denied the defendants' request, and most trust funds were distributed in 1980 in return for releases not affecting rights in this case.

The district court found that the plan administrators acted reasonably in seeking the determination from the IRS and in setting aside a substantial reserve for attorney fees, accounting and other expenses. In its findings of fact and conclusions of law, the district court did not mention the attempt to make distribution of vested funds to plaintiffs contingent on a release from liability in this case. Nor did the district court address the proper application of the Reliable Trust instruments and the Internal Revenue Service regulations concerning termination of employee benefit plans. Further,***137** the district court appears not to have considered the effect of the clear conflict of interests that crystallized when this litigation was filed. *See supra* note 23. Finally, the district court's findings of fact and conclusions of law are inconsistent in regard to the apparently important question whether the IRS determination was sought before or after the beginning of the bankruptcy proceedings.[FN35] Therefore, we vacate the district court's findings with respect to the delayed distribution of the Trust and damages which plaintiffs might have suffered from the delay. On remand the district court should consider when the Reliable Trust terminated and whether Dardick, Zuckerman and the National Boulevard Bank violated their fiduciary duties by delaying distribution of the Trust after bankruptcy proceedings had begun, by seeking an IRS determination regarding the termination of the plan, and by delaying distribution while seeking to make distribution contingent on releases from liability in this lawsuit. The court should also consider whether Engle and Libco fulfilled their fiduciary duties in overseeing the administrators' actions in delaying distribution. *See supra* Part IV. In addition, the court should also consider the extent, if any, to which plaintiffs may have been damaged by the delayed distribution of plan assets.

FN35. In its Finding of Fact No. 17, the district court said the defendants acted reasonably in seeking the IRS determination *before* bankruptcy proceedings began. In its Conclusion of Law No. 14, the court concluded that the defendants' decision to seek the IRS determination *subsequent* to the beginning of bankruptcy proceedings was not arbitrary or capricious. The precise timing of these events could be decisive in light of 26 C.F.R. § 1.401-6(b)(1) (1983) and § 9.1(b) of the agreement establishing the Reliable Trust.

VI.

[11] On remand the district court will face the formidable task of finding an appropriate measure of damages, if any, with regard to all defendants found to be liable as fiduciaries. Of course, the starting point for the inquiry is the language of 29 U.S.C. § 1109(a), which provides that:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable ... to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary....

Plaintiffs contend that they are entitled to *all* profits made by Engle, Libco, Telco, Telvest, Dardick and Zuckerman in their own investments in Berkeley, OSI and Hickory. The plaintiffs' argument reaches too far, for it ignores the limiting words, "made through use of assets of the plan." 29 U.S.C. § 1109(a). We believe that this language of section 1109 permits recovery of a fiduciary's profits only where there is a causal connection between the use of the plan assets and the profits made by fiduciaries on the investment of their own assets. *Cf. Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir.1982) (plaintiffs must prove causal connection between plan losses and breaches of fiduciary duty). The Reliable Trust investments in Berkeley, OSI and Hickory were relatively small in proportion to the investments made by the whole Engle group.[FN36] If plaintiffs were to recover all profits made by all defendants in these transactions, the recovery could double or triple the size of the trust.

FN36. The table below shows the investments in Berkeley, OSI and Hickory by the Reliable Trust, investments by all members of the Engle group, including the trust, on April 16, 1978, before the Telco purchases, and the maximum holdings of the Engle group in each company. Percentages are percentages of each company's total outstanding shares.

	Berkeley	OSI	Hickory
Reliable Trust holdings	0.65%	0.87%	0.67%
Engle group holdings on April 16, 1978	4.64%	1.68%	4.88%
Maximum holdings of Engle group	10.70%	21.73%	52.80%

See Short Appendix at 29-33.

On remand the district court should determine whether the profits made by each defendant found to have breached his or its fiduciary duties are attributable, in whole or in part, to the Engle group's use of the ***138** trust and its assets. We recognize that in the context of a contest for corporate control, this inquiry into causation may be exceedingly difficult. Where, for example, the success and profitability of substantial minority investments depended upon the total amount of stock accumulated, it may be difficult to determine how much of the profit, if any, was attributable to the marginal increase in the group's block of shares contributed by the Reliable Trust. Also, the timing of the trust's investments may be relevant. Although the trust's investments in the three companies were small in proportion to the Engle group's total investments in the companies, the trust investments were made very early in the control contests, when it may have been particularly valuable to acquire the first shares discreetly. We offer these observations, which are, of course, speculative, by way of suggestion to the district court in unravelling an extraordinarily difficult damages issue. There may well be other important considerations which the district court will discover when the parties present evidence which explores the issue of causation.

[12] The problem of apportioning a wrongdoer's profits between those produced by his or her own legitimate efforts and those arguably resulting from his or her wrong is familiar to courts in other areas of the law. Where ERISA is silent as to how profits should be

apportioned, we draw on those other areas of law for guidance. Perhaps the closest analogy is the apportionment of a copyright infringer's profits. The owner of a copyright may recover the infringer's profits, but only those attributable to the infringement and not to the infringer's own efforts and talents. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 49 (2d Cir.1939) (L. Hand, J.), *aff'd*, 309 U.S. 390, 60 S.Ct. 681, 84 L.Ed.2d 825 (1940). Where an infringer's profits are the product of both the infringer's own efforts and the infringement, a precise calculation is virtually impossible, yet justice requires that courts make estimates. In making an estimate, because the defendants are responsible for "mingling the plaintiffs' property with their own," doubts should be resolved against the defendants so that the amount awarded "will favor the plaintiffs in every reasonable chance of error." *Sheldon, supra*, 106 F.2d at 51.[FN37] Patent infringement decisions under a prior statute with similar provisions requiring the disgorgement of profits took a similar approach to apportioning profits. *See Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 235 U.S. 641, 35 S.Ct. 221, 59 L.Ed. 398 (1915); *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co.*, 225 U.S. 604, 32 S.Ct. 691, 56 L.Ed. 1222 (1912).

> FN37. When *Sheldon* was decided, the Copyright Act provided that the infringer would be liable for, among other things, "all the profits which the infringer shall have made from such infringement...." 17 U.S.C. § 25(b) (1934). With respect to its causation element regarding profits, this provision is quite similar to the language of ERISA, 29 U.S.C. § 1109(a), which we apply here.

This case is also similar to the common law problem in which a trustee commingles trust assets with his or her own so that it is difficult to discern which property and profits belong to whom. In a suit against the trustee, the trustee has the burden of showing which property and profits are his. The trustee is responsible both for the difficulty and for resolving it. *See* 5 A. SCOTT, THE LAW OF TRUSTS § 515 at 3612 (3d ed. 1967); 1 G. PALMER, THE LAW OF RESTITUTION § 2.13 (1978); *Grodsky v. Sipe*, 30 F.Supp. 656, 661 (E.D.Ill.1940); *Winger v. Chicago City Bank & Trust Co.*, 394 Ill. 94, 111, 67 N.E.2d 265, 277 (1946).

[13] Based on the treatment of these similar problems of apportionment, we believe that the burden is on the defendants who are found to have breached their fiduciary duties to show which profits are attributable to their own investments apart from their control of the Reliable Trust assets. It is conceivable that the defendants who have breached can show they received no benefit at all from use of the trust assets. In any event, while the district court may be able to make only a rough approximation, it should resolve ***139** doubts in favor of the plaintiffs. *Sheldon, supra*, 106 F.2d at 51.[FN38] This course should avoid the two unfair results of depriving defendants of the profits earned by their own efforts or depriving the plaintiffs of any recovery simply because the defendants have made it difficult to disentangle commingled profits.

> FN38. The *Sheldon* rule was adopted in light of the common law of trusts. "[A]n infringer carries the burden of disentangling the contributions of the several factors which he has confused. The law requires him to resolve any doubts arising from his wrong; he is like any other constructive trustee." 106 F.2d at 48 (citing *Callaghan v. Myers*, 128 U.S. 617, 666, 9 S.Ct. 177, 191, 32 L.Ed. 547 (1888)).

We believe that this approach to the damages in this case is also in accord with the overall purpose of ERISA and the flexible remedial powers provided in 29 U.S.C. § 1109(a). The primary purpose of ERISA is to protect the interests of plan beneficiaries, and the disgorgement requirements of section 1109(a) are intended to promote their interests by removing the fiduciary's incentives to misuse trust assets. Yet that provision would be of little value if, in cases such as this, beneficiaries confronted an insurmountable obstacle in proving the extent of a fiduciary's profits. *See Brink v. DaLesio*, 667 F.2d 420, 426 (4th Cir.1981) (burden of proof on trustee to show that prohibited transaction did not damage trust). We read section 1109(a), providing that the fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate," as authorizing us to cast the burden of proof on the defendants here to ensure that the disgorgement remedy is effective.

On remand, therefore, the district court should determine the extent of the defendants' profits, if any, made "through use" of the Reliable Trust assets. In doing so it must remember that the need for apportionment arose on account of defendants' breaches of their fiduciary duties. Plaintiffs must be denied a windfall but must receive the benefit of such reasonable doubts as appear.

In addition, some defendants may be liable as

fiduciaries for damages resulting from delays in distribution. *See supra* Part V.

VII.

The district court also awarded costs and fees to all defendants, and it found that Dardick, Zuckerman and the National Boulevard Bank were entitled as fiduciaries to reimbursement for costs and attorneys' fees from the assets of the Reliable Trust. One law firm has represented all defendants in this case. The awards of costs and attorneys' fees to all defendants cannot stand.

[14] ERISA provides that the district court in its discretion may award attorneys' fees to any party, 29 U.S.C. § 1132(g)(1), but the court's discretion is not unbounded. The courts have developed standards for the exercise of their discretion in awarding attorneys' fees under ERISA.[FN39] The district court made no findings and apparently undertook no analysis that would justify an award of fees to any defendants. From the record we can discern no grounds for the district court's fee award, and therefore we would have to vacate the award to all defendants even if we were to affirm the district court's judgment on the merits. *Cf. Janowski v. International Brotherhood of Teamsters Local No. 710 Pension Fund*, 673 F.2d 931, 941 (7th Cir.1982) (upholding fee ***140** award where basis for award could be discerned from record), *vacated on other grounds*, 463 U.S. 1222, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983).

FN39. In deciding whether to award fees, the court should consider several factors, including: (1) The degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Marquardt v. North American Car Corp., 652 F.2d 715, 717 (7th Cir.1981) (quoting *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir.1980)). Even where the plaintiff does not prevail on his or her claim, an award of attorneys' fees against an ERISA plaintiff will rarely be justified. *See Marquardt, supra*, 652 F.2d at 719-20.

[15] In any event, because we hold that Dardick and Zuckerman violated their duties to administer the Reliable Trust solely in the interest of the beneficiaries, we reverse the award of fees and costs for those defendants. Where an ERISA beneficiary substantially prevails on the merits of his or her claim, an award of fees with respect to such a claim against the party in question would almost always be an abuse of discretion. *See Miles v. New York State Teamsters Conference*, 698 F.2d 593, 602 (2d Cir.) (vacating award of fees to plaintiffs where judgment for plaintiffs was reversed on appeal), *cert. denied*, 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983); *Kemmis v. McGoldrick*, 706 F.2d 993, 997-98 (9th Cir.1983) (vacating fee award to employer where judgment for employer was reversed on appeal).

Because we vacate the district court's conclusions that Engle, Libco and the National Boulevard Bank are not liable as fiduciaries, we also reverse the award of fees and costs to them. Plaintiffs may still show that these defendants breached their duties to the trust and its beneficiaries, so any award of fees is premature. Also, even if Engle, Libco and the bank had prevailed on the merits, the district court's failure to establish a basis for the fee award and the problems of apportionment where one firm of attorneys represents all defendants would require us to vacate the fee award to these defendants.

Plaintiffs have not prevailed on the merits against Telco and Telvest, but we must vacate the award of attorneys' fees to Telco and Telvest. As we noted above, because the district court failed to analyze the factors relevant for awarding fees under ERISA, there is no basis in the record for the award of fees to Telco and Telvest. Further, because all defendants in this case were represented by one law firm, and because we reverse the award of fees to Dardick, Zuckerman, Libco, the bank and Engle, it is now impossible to determine Telco's and Telvest's shares of the total defense costs. In any event, we question whether the factors relevant to ERISA fee awards would justify a fee award for Telco and Telvest. Therefore, we vacate this award and leave all other matters involving fee determinations-whether in favor of defendants or in favor of plaintiffs-for the district court on remand.

SUMMARY

Our treatment of the district court's findings may be summarized as follows. First, we reject the conclusion that Dardick and Zuckerman did not violate their fiduciary duty to act solely in the interests of plan beneficiaries and find to the contrary. We hold that as a

matter of law, the investments in OSI, Berkeley and Hickory were not made for the exclusive benefit of the plan beneficiaries. We also vacate the district court's conclusion that Engle and Libco were not liable as fiduciaries with respect to the investments and leave further fact-finding in this respect to the district court.

With regard to the delayed distribution of remaining plan assets, we vacate the district court's findings that the delays were reasonable and did not injure the plaintiffs. On remand the district court should consider whether the delays were proper and whether plaintiffs were damaged in any way by the delayed distribution of their vested funds in the trust. The court should also consider whether Engle and Libco fulfilled their duties with regard to the delayed distribution. In addition, the district court should consider at the first opportunity the desirability of an immediate distribution of all remaining assets in the Reliable Trust.

We reverse the district court's award of attorneys' fees and costs to Dardick, Zuckerman, Engle, Libco and the National Boulevard Bank. We vacate the fee awards to Telco and Telvest. Finally, the district court on remand will need to consider the question of damages with respect to each ***141** defendant found to have violated the fiduciary duties imposed by ERISA.

VACATED AND REMANDED.

C.A.Ill.,1984.
Leigh v. Engle
727 F.2d 113, 4 Employee Benefits Cas. 2702

END OF DOCUMENT